United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

77-1264

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P/S

To be argued by
ROBERT J. AURIGEMA

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

-against-

ANTHONY NAPOLI,

Defendant-Appellant.

On Appeal from a Judgment of Conviction of the United District Court for the Southern District of New York.

BRIEF FOR DEFENDANT-APPELLANT

DORAN COLLERAN O'HARA
POLLIO & DUNNE, P.C.
Attorneys for Defendant-Appellant
1461 Franklin Avenue
Garden City, New York 11530
(516) 248-5757

UNITED STATES COURT OF APPEALS
FILED
JUL 15 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 77-1264

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANTHONY NAPOLI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT ANTHONY NAPOLI

Preliminary Statement

There is no opinion of the District Court (Lloyd F. MacMahon, J.). The Court's Judgment and Probation/Commitment Order is reproduced in the Joint Appendix, at A. 402a.*

Issues Presented

1. Whether the record is replete with prejudicial innuendo and inferences mandating a reversal of defendant's conviction.

A. Whether defendant was unduly prejudiced by the introduction of evidence elicited on cross examination of himself and of his character witnesses as to an alleged misstatement on his federal tax return when such evidence was submitted to the jury on defendant's propensity to commit the crimes in the indictment without a limiting instruction as to its proper scope.

B. Whether the testimony of the government investigator, suggestive of a considerable number of government witnesses who would testify to the same effect as those called, coupled with the prosecutor's closing remarks, constituted incompetent "other crime" evidence which was unduly prejudicial to defendant.

*References are to pages in the Joint Appendix and are preceded by a capital "A". References to pages in the Exhibit volume will be preceded by a capital "E".

C. Whether the conduct of the prosecutor denied defendant a fair trial.

2. Whether a charge of perjury can be sustained by lifting the alleged perjurious statement out of context, thus giving it a meaning different from that which its content shows.

3. Whether the actions of the United States attorney in securing the indictment herein based completely on hearsay violated the standards set by this Court.

4. Whether the overwhelming amount of undue prejudice which the defendant was exposed to without objection below shows the inadequacy of counsel for the defense and whether that inadequate representation denied defendant his rights under the sixth and fourteenth amendments.

5. Whether the District Court improperly discharged its duty to impose an appropriate sentence.

6. Whether the verdict of guilty on all counts is supported by the weight of the credible evidence.

STATEMENT OF THE CASE

This criminal proceeding was instituted by the filing of an indictment by the United States of America on March 3, 1977 (A. 3a-8a). The indictment charged defendant-appellant, Anthony Napoli (the "Defendant" or "Napoli") with twenty counts of violation of 18 U.S.C. §§ 287 and 2 and twenty counts of violation of 18 U.S.C. §§1001 and 2 arising out of his participation in the Medicaid program as a Medicaid provider within the meaning of Title XIX of the Social Security Act (The Medicaid Act). Defendant was charged with submission of false claims and making false statements in connection with his submission of invoices for collection of payment with respect to certain patients outlined in the indictment (A. 4a-7a). The indictment also charged the defendant with unlawfully, wilfully and knowingly making a false material declaration before a Grand Jury on January 16, 1975 which was conducting an investigation into certain aspects of alleged medicaid fraud connected with certain clinics run by Dr. Joseph Ingber and Mr. Sheldon Styles (18 U.S.C. §1623) (A. 7a-8a).

The defendant entered a plea of not guilty (A. 402a). By notice of motion dated March 24, 1977, defendant moved to dismiss the indictment on the grounds of (i) pre-indictment

delay, (ii) the systematic exclusion of eighteen to twenty four year olds from both the grand and petit jury lists, (iii) failure of the indictment to charge a federal crime and (iv) failure of the grand jury to vote separately on each count (A. 9a-10a). Defendant also moved for an order of disclosure requiring the government (i) to furnish a witness list containing the last known addresses of the witnesses the government intended to call at trial and (ii) for an order permitting inspection of the grand and petit jury selection lists and all other pertinent data in connection with the selection process. (A. 9a-10a).

A pre-trial conference was held on March 25, 1977 at the request of defense counsel. After argument on portions of the application, the requested relief was denied in full except for inspection of the grand jury lists (A. 20a, 21a-63a).

Trial was commenced on May 2, 1977 before the Honorable Lloyd F. MacMahon, District Judge and a Jury (A. 64a). The trial continued for a day and one-half. Counts 1 through 20, 24, 29, 31, 37 and 40 were dismissed on motion of defense counsel with the consent of the government (A. 402a). Defendant was found guilty on the remaining counts (A. 381a-383a).

On May 24, 1977, defendant was sentenced by the Court (A. 402a). Defendant received two years imprisonment and was

fined $10,000.00 on each of Counts 21 through 23, 25 through 28, 30, 32 and 36, 38 and 39, to run concurrently with each other. Defendant also received a two year sentence and a $10,000.00 fine on Count 41, the perjury count (A. 402a). Execution of the prison sentence on Count 41 was suspended and defendant was placed on probation for a period of two years to run consecutively with the jail sentence on the prior Counts. The fine, likewise was to run consecutively for a total fine of $20,000.00. (A. 402a).

Defendant appealed this conviction on May 24, 1977 (A. 2a) and was released on his own recognizance pending appeal.

STATEMENT OF THE FACTS

The Medicaid Clinics

Defendant, Anthony Napoli, is a chiropractor by profession duly licensed to practice in the State of New York (E 26). In an attempt to obtain some income while he tried to build a private practice, Doctor Napoli answered a newspaper ad in the early part of 1971, to the best of his recollection, and commenced work in the Galler Clinic (A. 264a, E 43). To defendant's knowledge, Galler was owned by a Dr. Joseph Ingber and a Mr. Sheldon Styles (E 42). Defendant did not know either of them personally (E 41-E 42).

In connection with his participation in the clinic, defendant incurred various rental and administrative costs (E 44). In addition, defendant incurred factoring costs (A. 283a, E 48). Defendant would receive payment on the basis of the number of treatments he would administer during the course of a day (E 1 - E 2').

Defendant subsequently went from the Galler Clinic to the Lee Avenue Clinic which was not in any way connected with Ingber and Styles (A. 264a, E 47). The procedures followed at the latter clinic were basically the same (A. 265a-268a).

The defendant worked on a three day schedule at the clinic (E 44, E 46), and besides treating new and former medicaid patients of his, he also administered chiropractic treatments for patients of his chiropractor colleague on the days when the latter was not present at the clinic (E 60). This was done as a matter of professional courtesy, i.e., an accommodation each doctor performed for the other. Only the patient's original doctor would bill for such services (E 60-E 61).

Billing Procedures

The defendant maintained treatment records for each medicaid patient treated. This consisted of index size cards

(E 51) noting the particular patient's complaint together with the dates of the visits for that patient (E 51, 270a-271a). A day book containing names of patients who visited him on a given day was utilized at the Galler Clinic but defendant found that treatment cards were more efficient and that was the record keeping process used at Lee Avenue (A. 268a). Although a daily logbook was kept at the main reception desk for the registration of the medical patients of the clinic, no such procedure was followed in the case of chiropractic patients (A. 267a). The defendant was the sole custodian of his records (A. 267a), and was the only one who kept records concerning his patients at the clinic (A. 268a).

Invoices were prepared from the patients' treatment records by the defendant, with no clerical or other assistance from any other personnel at the clinic (E 62-E 63). Those invoices were then forwarded to the City of New York for payment. Treatment plans of a medicaid patient had to be submitted to the city for approval after the patient's third visit, if such patient required further visits (E 66, E 75). If such plan was approved for a given patient, a course of treatment outlined in the plan would be followed (E 75). The clerical duties in connection with these plans were performed exclusively and entirely by the defendant for each patient (E 66).

Based on the foregoing procedure, given the size of

the defendant's practice at the time in question (A. 265a), the potential for a transcription error was obvious (A. 273a).

Government Investigation Of The Defendant

Government investigation of this defendant dates back to 1972. At that time, the defendant delivered to a government postal inspector, by his own free will and not pursuant to subpoena, records pertaining to his medicaid practice (A. 268a, E 52). In 1975, the defendant was contacted by the government and asked to testify before a United States Grand Jury in the Southern District of New York in connection with the Joseph Ingber and Sheldon Styles Medicaid Clinics' investigation (A. 269a, 28a). Defendant, without having been subpoenaed, voluntarily appeared before the grand jury, did not contact a lawyer to represent him in connection therewith and did not at any time during his appearance request immunity (A. 269a). Before his testimony, defendant was given a warning by the Assistant United States Attorney that the scope of the grand jury investigation was into all clinics run by Ingber and Styles, and that as one who possibly worked in one of the clinics, he was a potential target 'E 39-40). At the time of his appearance, the defendant voluntarily produced his appointment book, invoices and patient records for the government (A. 270a, 28a).

Almost one year later, the defendant was called by the Assistant United States Attorney. A conference was held,

and pursuant thereto, defendant voluntarily produced further records (A. 270a, 29a). Although originally called to this conference under threat of indictment, the defendant heard nothing further from the government until the present indictment was handed down in March, 1977 (A. 29a).

The Trial

(i) The Government's Witnesses

Fifteen patients from defendant's Lee Avenue practice were called by the government in support of the counts charged in the indictment. They all testified that they did not visit a chiropractor to the extent listed in the invoices submitted as government exhibits herein (E 1-E 24). They all testified with a high degree of certainty that they visited a chiropractor at the Lee Avenue Clinic once, twice or three times but not the number of times listed in the invoices (A. 88a, 107a, 124a, 134a, 143a, 156a, 165a, 177a, 185a, 195a-196a, 206a, 217a, 224a-225a, 235a, 253a). Notwithstanding the representation made to the Court by the Assistant United States Attorney (A. 31a), not one witness testified that they were taken aback in any manner when they received a telephone call from a government official investigating medicaid fraud, despite the fact that at least two witnesses admitted that on numerous occasions people traded their medicaid cards (A. 110a, 138a). All the witnesses testified from their recollection of events of four and one half to five years before trial (E 1-E 24).

These same witnesses, however, couldn't remember much of anything else. One witness testified that of all the doctors she had ever seen, the only one she remembered the number of visits with, was defendant Napoli (A. 102a). This same witness testified that it may have been possible that she told a defense investigator a week earlier that she could not understand how anyone could expect her to remember what happened five years ago (A. 102a). Her uncertainty resulted from a lapse of memory of an event one week prior (A. 95a). This same witness couldn't remember the name of the last doctor she saw (A. 103a).

At least one witness testified that she had lost her medicaid card in the "hot months" of 1972 although she didn't remember precisely when (A. 251a, A 254a). The invoice dates for the patient covered July and August, 1972 (E. 22). Anyone could have picked up this card and used it (A. 267a). It is incredible that the government would even proceed on this count. Yet, in light of the prejudice reflected in the record, defendant was convicted on that count.

Another witness testified about the trouble she was having with an Ace bandage placed on her foot by the "chiropractor" (A. 184a). This same witness didn't recall going to a foot doctor at the Lee Avenue clinic (A. 193a).

The rest of the witnesses followed a general pattern - they could remember chiropractic services but not those of a gynecologist (A. 111a-112a). Some couldn't remember

even recent medical treatment in any great detail (A. 181a-182a). The recollection of certain other events in 1972 was understandably shaky (A. 229a-230a, A. 126a, A. 188a-190a).

At least two witnesses were able to identify the defendant in court although both of these witnesses testified that they had only visited the defendant once, over four years prior (A. 205a, A. 252a).

While the government may have supplied a quantity of evidence, the quality of evidence premised on the five year old recollection of events, and marshalled at the behest of governmental authority, was certainly questionable. Defendant submits that it was error for the trial court to have denied defendant's motion under Rule 29(a) Fed. R. Crim. P. for a judgment of acquittal on the ground that the evidence presented on the government's case is insufficient to sustain a conviction (See Point VI, infra).

(ii) The Government Investigator

The government investigator in charge of the Napoli investigation was placed on the stand and allowed to testify that the reason that only forty five of defendant's former patients were contacted was that the investigator was satisfied that these were enough witnesses for trial (A. 260a). Further, the investigator was changing jobs

and consequently was under a time restraint (A. 260a). The prosecutor used this testimony to suggest to the jury that since the government called one out of every three patients the government had contacted to testify against the defendant, there was a veritable army of former patients ready to march in and testify to the same effect (A. 314a).

This suggestion flies in the face of the true facts underlying the government's prosecution of this defendant. From late 1972, the defendant's activities have been scrutinized by the government in their investigation of clinics run by Dr. Joseph Ingber and Mr. Sheldon Styles (A. 268a-269a). Yet, it was not until late 1976 that the government was allegedly able to develop a case against this defendant (A. 47a).

The present prosecution involved fifteen counts. The total amount involved in all fifteen invoices was $450.00 (E 1 - E 24). When visits which even these witnesses admitted to are considered, the alleged fraud is in the amount of $372.00. The government, however, left the jury with the impression that defendant's liability was unlimited.

(iii) The Defense

Defendant was indicted in the fifth year of the statute of limitations. He had no records available for defense of these charges. He merely asserted his innocence

and relied on his character witnesses who attested to his outstanding reputation in the community (A. 273a-274a, 286a-306a).

(iv) Government Exhibits

The prosecution made much of a 1972 calendar which when compared to the invoices in question showed that the defendant billed for four days a week when he testified that he only worked three days a week (E 36). The invoices, however, may well have reflected the fact that if defendant was not in the clinic when one of his patients came in for a treatment, another chiropractor would treat the patient, and the defendant, not the treating doctor, would bill for such services (E 60 - E 61, p. 7 supra.).

Another government exhibit established that one of the one hundred and fifty invoiced dates reflected a date on which the patient in question was in the hospital (E 12). Given the inordinate amount of paperwork involved in the defendant's medicaid practice, however, the margin for error in transcribing was substantial (pp. 7-9 supra).

In summation, the prosecutor depicted the defendant as a tax evader and an integral cog in a medicaid mill operation. The jury returned a verdict of guilty on all counts (A. 381a-383a).

POINT I

THE RECORD IS REPLETE WITH PREJUDICIAL INNUENDO AND INFERENCES MANDATING A REVERSAL OF DEFENDANT'S CONVICTION.

A. Defendant Was Unduly Prejudiced By the Introduction Of Evidence Elicited On Cross Examination Of Himself And Of His Character Witnesses As To An Alleged Misstatement On His Federal Tax Return When Such Evidence Was Submitted To The Jury On Defendant's Propensity To Commit The Crimes In The Indictment Without a Limiting Instruction As To Its Proper Scope.

Defendant took the stand in the case at bar and was cross examined as to the gross earnings listed in his 1972 federal tax return (A. 281a-283a, 284a-285a). The prosecutor questioned an apparent discrepancy between the amount that the New York City records showed defendant receiving in 1972 as a result of his medicaid practice and the figure for gross earnings which defendant had listed on his return (A. 281-283a, E 29 - E 35). No objection to this line of inquiry was interposed by trial counsel for defendant. Consequently, the court below never determined whether the probative value, of what, in the prosecutor's terms, developed into evidence of other and similar crimes to those charged in the indictment, was outweighed by the obvious prejudicial effect of such testimony. Rule 403 Fed. R. Evid. The prosecutor made similar references to defendant's 1972 tax situation in

his cross examination of three of defendant's seven character witnesses (A. 293a, 298a, 301a).

In his summation to the jury, the prosecutor took occasion to characterize the tax incident as the defendant's having "cheated on $9,000.00 worth of gross income" (A. 319a) and fully outlined the government's position relating to the alleged tax fraud (A. 321a). In his summation, defendant argued that the income tax matter was not on trial (A. 342a). Defendant recognized the potential impact this testimony had on the jury and proceeded to argue that the government really didn't have a tax case against the defendant (A. 343a). The prosecutor then came back and closed his summation by stating unequivocally:

> "ladies and gentlemen, you can find that a person who does not claim $9,000.00 on his tax return would be willing to cheat on Medicaid vouchers." (A. 350a).

Defendant did not request a limiting instruction and despite the prosecutor's closing comment, none was given by the court.

It is respectfully submitted that the failure to give a limiting instruction in the above circumstance constitutes "plain error" within the meaning of Rule 52(b) Fed. R. Crim. P., notwithstanding defendant's failure to so request.

While admission of "other crimes" evidence to contradict a specific fact testifed to by defendant may be

proper, the testimony insofar as it related to the defendant in the instant case should be considered only in passing upon defendant's credibility and not as evidence of guilt. United States v. Keilly, 445 F.2d 1285, 1289 (2d Cir. 1971). Moreover, cross examination of defendant's character witnesses with respect to defendant's questioned tax filing, was not relevant to defendant's propensity to commit the crimes under indictment, but rather, likewise went merely to the credibility of the witness, to test his familiarity with the defendant and the defendant's reputation, and to test his ability to formulate an opinion about the defendant's character. Shimon v. United States, 352 F.2d 449, 453-454 (D.C. Cir. 1965).

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. Rule 404(b) Fed. R. Evid. It is axiomatic that evidence of a criminal bent or propensity to commit the crimes under indictment is contrary to our basic tenets of justice, fostering as it does the very inference that the government requested this jury to infer, namely, that since defendant is guilty of tax fraud he is guilty of medicaid fraud.

Given the prejudice of "other crimes" evidence, the need for a limiting instruction is apparent. The trial court refused to grant a limiting instruction in Gross v. United

States, 394 F.2d. 216 (8th Cir. 1968), cert. denied, 397 U.S. 1013 (1970), after defendant's character witness was cross examined about certain of defendant's improprieties with relation to the issuance of certain checks. The appellate court found error in not providing instructions on the limited applicability of the evidence, stating that:

> "[w]ithout the meticulous and careful guidance of the trial judge, however, the jury may well not understand the purpose at all. They may take the question and its reference to specific acts or crimes as bearing directly upon the character of the defendant and his propensity to commit crime. They may take as established the truth of the inferences contained in the question. Such use would circumscribe directly the careful rule designed to prevent this highly prejudicial use of such evidence..." 394 F.2d at 222.

See also Michelson v. United States, 335 U.S. 469, 472 (1948).

Notwithstanding the onus placed on defendant under Rule 105 Fed. R. Evid. to make the specific request for the instruction, the failure to so instruct in this case was error, "plain error" within the meaning of Rule 52, Fed. R. Crim. P., affecting as it did substantial rights of the defendant. Counsel for the defendant, in his summation, when he attempted to charge the law on reasonable doubt to the jury was sua sponte cut off by the court (A. 335a-337a). On the other hand, when the prosecutor expressly told the jury that they could find guilt of one crime premised on the guilt of the prior crime, the court stood mute. Defendant respectfully

submits that under these circumstances the failure to give a limiting instruction to the jury played a considerable role in defendant's ultimate conviction.

Even in the case of a failure to request an instruction, the courts will protect the rights of a defendant in a criminal matter where life and liberty are at stake. Cleaver v. United States, 238 F.2d 766, 770 (10th Cir. 1956). The right to have a defendant's guilt or innocence determined on the specific offense charged and not prior offenses has been expressly recognized by this Court. United States v. Beno, 324 F.2d 582 (2d Cir. 1963).

Nor is the evidence of guilt on the offenses charged in the case at bar so overwhelming that it can be said that the error was harmless within the meaning of Rule 52(a) Fed. R. Crim. P. The government's entire case was based on the recollection of a cumulation of witnesses of events which transpired in many instances nearly five years before their testimony. The witnesses could not remember much of anything other than the number of times they did not visit the defendant chiropractor. Some could not even remember the name of their last doctor (A. 103a). The quality, as opposed to the quantity, of evidence against defendant was lacking.

The express inference that the defendant committed tax fraud and therefore medicaid fraud was crippling under

these circumstances. It is clear, however, that in assessing the doctrine of harmless error:

> "...it is not enough that the jury would have in all probability returned a verdict of guilty against the other defendants without knowledge of Jones' confession which they were forbidden to possess (Citation omitted). The test is whether belief is sure that the error did not influence the jury, or had but very slight effect,'. Kotteakos v. United States, 328 U.S. 750, 764-765, 66 S.Ct. 1239, 1248, 90 L.Ed. 1257 (1946)...." United States v. Bozza, 365 F.2d 206, 218 (2d Cir. 1966).

Based on the cumulation of prejudice flowing from the jury's license to use "other crime" evidence for the wrong purpose, as well as the prejudice to defendant flowing from the multiplicity of other errors in the record (infra), the failure to give a limiting instruction constitutes reversible error.

The "other crime" moreover consisted of an apparent misstatement of gross income on defendant's 1972 federal tax form (E 30 & E 33). As defendant explained on the stand the error stemmed primarily from an error in the labeling of a deduction as including factoring costs when in fact those factoring costs were never included in gross income and accordingly not deducted under "Medicaid Factor Costs and Administrative Costs" (E 33, A. 283a-285a). Furthermore, there were items of disallowance arising out of prior payments

which the factor had taken off the figure listed in Exhibit 26 and which amounts were never paid to the defendant (A. 284a).

B. The Testimony Of the Government Investigator, Suggestive Of A Considerable Number Of Government Witnesses Who Would Testify To the Same Effect As Those Called, Coupled With The Prosecutor's Closing Remarks, Constituted Incompetent "Other Crime" Evidence Which Was Unduly Prejudicial To Defendant.

The court allowed, over defendant's objection, the testimony of a government investigator who had conducted the original telephone interviews with the witnesses presented on the government's case in chief (A. 260a). The investigator was asked why she did not call more than the forty-five (45) patients she had testified to calling in the Napoli investigation. The witness was allowed to answer:

> "I felt I had an adequate number of witnesses and also my appointment as an investigator would have ended in February so I did not have time to contact more." (A. 260a).

The prosecutor picked up on this testimony in his summation by constantly referring to the "one out of three" number of people that Miss Morey contacted, coming into court, and telling a similar story (A. 314a). In fact, he mentioned this "one out of three" no fewer than five times in summation (A. 314a, 318a, 348a, 349a). He made his point quite clearly:

> "And you heard Miss Morey get up on the stand and testify that number of people she contacted were 45, and we have 15 out of the 45, one out of every three that she contacted. She did not have time to do any more and she did not feel the need to go any further, although Mr. Weisenfeld says that there were more patients than these. One out of three." (A. 314a).

The point is obvious. From testimony adduced at trial it was established that defendant treated anywhere from 1500 to 2000 patients in the year 1972. Time and temperament willing, Miss Morey would have contacted 1500 of the defendant's former patients. The clear inference was that of this 1500, 500 would have marched into court and told a story similar to the story told by the 15 people actually called.

The court was faced with a similar version of incompetent and prejudicial evidence which was attempted to be paraded in as Rule 404(b) "other crime" evidence in United States v. Brown, 548 F.2d 1194 (5th Cir. 1977). Defendant, a tax preparer, was charged with preparing fraudulent income tax returns. Approximately 163 returns prepared by defendant were audited with most containing over-stated deductions. The government proceeded on 17 counts against the defendant centering around 17 of these returns and elicited testimony from an IRS agent. The witness testified that of the 160 returns prepared by the defendant, between 90 and 95% of them contained the over-stated deductions. On appeal, defendant attacked this testimony.

The court in Brown noted the extremely prejudicial nature of the testimony (548 F.2d at 1204) and dismissed it out of hand primarily on the basis of its hearsay character and its inability to qualify as competent evidence or evidence of any sort under Rule 404(b).

The situation presented in the present case is degrees worse than the travesty the court was faced with in Brown. At least in Brown the testimony was quantitatively limited to returns actually audited by the government. Here the testimony sought to establish that in addition to the people actually contacted by the government, one third of all the people the government could have called would march in and testify in the same vein against defendant.

Moreover, the testimony in the present case couldn't raise itself to the level of the incompetent hearsay in Brown. In the case at bar, what one out of three of the remaining 1450 patients would attest to is merely unmitigated speculation on the government's part. It is not evidence and accordingly could not raise itself to the level of "other crime" evidence. Further, its prejudicial value so outweighs any probative value as to require an almost automatic exclusion under the balancing test of Rule 403 of the Federal Rules of Evidence.

What the testimony sought to show is evident from the record. The court felt that defendant, in referring to the indictment as centering on only 15 patients out of a clientele consisting of 1500, opened the door to testimony of this type from the government (A. 260a). The government cannot argue that the purpose of the testimony is other than to show that there were many more patients who were similarly the subjects of alleged overbilling. Instead of calling as

witnesses a few of this class, the government opted for the suggestive testimony of its investigator, and its amplification by the prosecutor.

This evidence, moreover, is startling when one considers the context in which it arises. The maximum dollar value of the medicaid counts charged in the indictment, viewed most favorably from the government's side, is a mere $372.00. (E 1-E 24). Given the necessary prejudice defendant must suffer by being indicted in the fifth year of a five year statute of limitations (see 18 U.S.C. §3282), and facing a cumulation of similar count witnesses, prejudice of the type engendered by the above enumerated testimony, which attempted to charge defendant with counts outside the indictment, should not be tolerated. Viewed from the record as a whole, such testimony constitutes reversible error.

In a similar vein, evidence was introduced at trial seeking to implicate the defendant in an alleged "ping ponging" scheme of needless referrals which, it is charged, benefitted defendant (A. 105a-106a, 252a). The obvious intent of the testimony was to implicate defendant in the running of the highly publicized "medicaid mill". As such, it constitutes evidence of misconduct, not charged in the indictment and not relevant on any of the issues enumerated in Rule 404(b).

Evidence of other crimes or criminal activity may be admitted only if (i) an issue on which the other crime evidence

may be received is raised, (ii) the proffered evidence is relevant to that issue, (iii) the evidence is clear and convincing, and (iv) its probative worth outweighs the probable prejudicial impact. United States v. Bledsoe, 531 F.2d 888 (8th Cir. 1976).

In the instant case, the expressed relevance of this testimony went to the intent of the government's witnesses to visit a chiropractor, an issue not at all raised in the indictment (A. 316a). It is submitted that the evidence with regard to ping ponging satisfies not one of the essential elements of "other crime" evidence. Accordingly, it is inadmissible on the government's case in chief and its admission constituted "plain error". Rule 52(b) Fed. R. Crim. P.

C. The Conduct Of The Prosecutor Denied Defendant A Fair Trial.

Apparently not content with the use of the Morey testimony as suggestive hearsay, incorporating the testimony of one-third of defendant's remaining patients, the prosecutor in the instant case framed the following questions to witness Morey:

> "Q. Of the 45 people, how many confirmed the number of visits that they saw Dr. Napoli?
> MR. WEISENFELD: Objection.
> THE COURT: Could I have the question read. (Question read)
> THE COURT: Sustained.

Q. Have you conducted similar investigations with respect to other doctors?

A. Yes, I have.
MR. WEISENFELD: Objection, your Honor.
THE COURT: Sustained. Strike it.
MR. BLOCH: No further questions."
(A. 261a).

The prosecutor was attempting to increase the "one out of three" ratio through the use of obvious hearsay testimony. United States v. Brown, supra. The question concerning the confirmations, at the least, begged a response favorable to the government, without the need of an answer. The Assistant United States Attorney was asking a government investigator the results of a government investigation. The reply would necessarily have to incorporate hearsay testimony of the most damaging sort. The question did not require an answer and none was sought. The jury had to know that the prosecutor knew the answer to that question and that the answer would be favorable to the government's position. He was after all walking through a door that the court declared open. The court had previously denied a defense request for an offer of proof on this testimony (A. 259a-260a).

The problem of insinuating questions and inflammatory remarks or prosecutorial misstatements is not new to this Court. United States v. Burse, 531 F.2d 1151 (2d Cir. 1976). The duty of the United States Attorney has been aptly stated:

> "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Berger v. United States, 295 U.S. 78, 88 (1938).

In a case such as the one at bar where a close question turns on the credibility of various witnesses, prosecutorial misstatements take on an added significance. See United States v. Burse, supra at 1155.

In addition to the Morey question, the prosecutor in summation made a totally uncalled-for remark. Speaking of defendant's records which were not produced at trial because they were not in existence, the prosecutor remarked:

> "Ladies and gentlemen, I think you can infer from that that those records may well not have supported him and, even if they did, there is nothing to say at that time he couldn't have made his records match to his invoices anyway." (A. 319a-320a) (emphasis added).

There is no support in the record for such statement. It is a needless smear insinuating that defendant would commit much the same type of misconduct that he had been charged with.

The prosecutor then proceeded to take this type of approach to its logical conclusion. Commenting on the alleged tax misstatment, the prosecutor addressed the jury as if the defendant's guilt on the question of tax evasion was settled, and that now it was only left for the jury to

infer from that guilt, the guilt of defendant on the medicaid charge (A. 350a). This type of misuse of evidence is not consonant with the duty of doing justice.

Further, the prosecutor commented on the "ping ponging":

> "Ladi gentlemen, I think you can infer he fact that all these patie[illegible] you how they came to the doctor, they were sent by the receptionist, sent by the foot doctor, sent by the gynecologist, they were sent by everyone, they had no intent to see a chiropractor. Of course, they wouldn't want to go back for ten visits..." (A. 316a)

This ping ponging scheme was not an activity charged in the indictment nor as a matter of record did all these witnesses testify that they never intended to go see a chiropractor or that the reference, if any, was other than for a medical purpose. The intent was further to smear and implicate defendant in a conspiracy that was never charged, the well publicized "medicaid mill." Nor was the witnesses' intent a contested issue in this case requiring such comment.

Having recognized that the issue in the case "boil[ed] down to the credibility of the witnesses" (A. 79a), the prosecutor attempted to undercut the defense character witnesses by depicting their failure to change their opinion of the defendant as "amazing", and expressing his personal view that it was out of a loyalty to the defendant that they

made those statements. (A. 319a). The prosecutor further attempted to mislead the jury in this regard, when he indicated to them that in their deliberations, their only choice on the counts tried was "[d]o you believe the 15 witnesses or do you believe Dr. Napoli?" (A. 350a). That the prosecutor's "all or nothing" suggestion greatly confused the jury is made obvious by the question it put to the court after commencement of its deliberations (A. 380a).

Such conduct on the part of the United States Attorney is in violation of the Code of Professional Responsibility (DR 7-106(c)(3) and (4)) and the dictates of this Court. United States v. Drummond, 481 F.2d 62 (2d Cir. 1973). This Court has noted that in a short two day trial such as the case at bar, the intemperate remarks of a prosecutor take on a greater significance than in a longer more hotly contested trial. United States v. White, 486 F. 2d 204, 206 (2d Cir. 1973).

The prejudice emanating from all the aforesaid is apparent, the error plain. The cumulation of prejudice mandates a finding of reversible error and a remand for a new trial consonant with the principles of fair play and justice.

POINT II

A CHARGE OF PERJURY CANNOT BE SUSTAINED BY LIFTING THE ALLEGED PERJURIOUS STATEMENT OUT OF CONTEXT, THUS GIVING IT A MEANING DIFFERENT FROM THAT WHICH ITS CONTEXT SHOWS.

In addition to the 15 medicaid counts, defendant Napoli was convicted of perjury on the basis of the following testimony before a Grand Jury - a Grand Jury investigating two prospective defendants other than Dr. Napoli and a clinic other than the one referred to in the present case:

> "Q. Dr. Napoli, did you ever submit a fictitious invoice in the sense that you either billed for a patient you had not seen or billed in excess of the number of visits you actually administered?"
> "A. No, I have not." (A. 258a).

Upon stipulation, that was the only portion of the grand jury testimony originally placed in the record, until the end of trial, when defense counsel attempted to make an offer of the entire transcript to place the matter in "context". Such offer was denied by the court, which couldn't see any problem with "context" (A. 378a).

A review of the Grand Jury testimony, however, leaves little doubt that there was a serious problem developing as a result of what had originally been a stipulation intended to resolve mere formalities (A. 65a-67a).

Defendant Napoli, appearing before the Grand Jury of January 16, 1975, was advised that:

> "The Grand Jury is investigating Medicaid fraud, and the scope of the investigation is into all physicians, paraphysicians, owners, secretaries, or anyone related to clinics run by Dr. Joseph Ingber and Mr. Sheldon Styles. The fraud that is being investigated is the submission of fictitious invoices to the city in connection with Medicaid." (E 39) (Emphasis added)

Defendant was further given his target warning:

> "This Grand Jury may return indictments against various people. As someone who possibly worked at one of these centers, you are potentially a target if you were in any way involved in any fraud if a fraud is found to have existed." (E 40) (Emphasis added)

What followed were approximately forty transcribed pages of testimony relating to defendant's activities at the Galler Clinic, an Ingber-Styles clinic. (E 38 - E 77) Records were elicited, again, dealing only with the Galler Clinic. (E 71). There was no interest expressed by the Grand Jury in the Lee Avenue Clinic once it was determined that it had no connection with the Ingber-Styles owned Galler Clinic or one of the other centers owned by Ingber-Styles (E 47). The witnesses produced at trial, on the other hand, were all patients whom the defendant had treated at the Lee Avenue Clinic (E 1 - E 24). The Lee Avenue Clinic had absolutely no connection with Ingber-Styles (E 47). The Lee Avenue clinic was not within the expressed scope of the

investigation of the subject Grand Jury (E 39 - E 40).

In the context of this investigation of the Ingber-Styles clinics, the defendant was asked whether he "ever" submitted a fictitious invoice. It is submitted that the question asked of the defendant which was the subject of Count 41 of the indictment must be qualified by the context in which it arose. Defendant was, in effect asked, within the stated scope of the Grand Jury investigation for which he was given the target warning, whether he ever submitted a false or fictitious claim in connection with his activities within an Ingber-Styles clinic, here the Galler Clinic. In that regard, there is no evidence in this record to contradict defendant's testimony.

It has been held that a charge of perjury may not be sustained by lifting a statement of the accused out of its immediate context, thereby giving it a meaning wholly different than that which its context clearly shows. Fotie v. United States, 137 F.2d 831, 842 (8th Cir. 1943).

Certainly, when the question was asked many qualifications were of necessity attached to the scope of inquiry. For example, it could not have been taken to mean submission of bills to private patients since that was obviously not the subject of the inquiry. The word "ever" would consequently be limited by the scope of inquiry. Likewise, the scope of inquiry would exclude reference to submissions emanating

from non Ingber-Styles clinics such as the Lee Avenue Clinic.

Moreover, the questioner has the duty to make the question and answer "unambiguously specific" if it is to be the subject of a perjury charge. United States v. Esposito, 358 F. Supp. 1032, 1033 (N.D. Ill. 1973). See also, Bronston v. United States, 409 U.S. 352 (1973). It is for the jury to decide whether appellant gave, or possibly could have given, any other meaning to the question. Seymour v. United States, 77 F.2d 577, 584 (8th Cir. 1935). It is respectfully submitted that the jury could not have performed that duty in this case absent a review of the full Grand Jury transcript. The jury could have concluded, with full transcript, that there was no meeting of the minds between inquisitor and defendant, the defendant taking the question to refer solely to Galler.

It is the government's burden "to prove beyond a reasonable doubt that the defendant both literally and as a matter of substance lied under oath." United States v. Esposito, supra at 1033. It is respectfully submitted that the government proved neither the requisite "mens rea" of defendant nor even the falsity of the testimony.

Accordingly, it was error for the court not to have admitted the full Grand Jury transcript and, once admitted, defendant's motion for a judgment of acquittal should have been granted. Alternatively, the matter should be remanded

for a new trial to determine whether defendant wilfully and knowingly made a false and material statement to a grand jury in violation of 18 U.S.C. §1623.

POINT III

THE ACTIONS OF THE UNITED STATES ATTORNEY IN SECURING THE INDICTMENT HEREIN BASED COMPLETELY ON HEARSAY VIOLATED THE STANDARDS SET BY THIS COURT.

A. Prejudice To The Defendant

The fact that the indictment herein was secured solely by way of the hearsay testimony of government investigators is just one further indication of the substantial prejudice visited upon this defendant in connection with the proceedings below. This Court has deplored this particula Government tactic which deprives the defendant of his right to impeach by contradiction. United States v. Borelli, 336 F.2d 376, 391 (2d Cir. 1964). See also United States v. Arcuri, 282 F. Supp. 347, 349 (E.D.N.Y.), aff'd, 405 F.2d 691 (2d Cir. 1968), cert. denied, 395 U.S. 913 (1969); United States v. Filippatos, 307 F.Supp. 564, 565 (S.D.N.Y. 1969); United States v. Pastor, 419 F.Supp. 1318, 1324 (S.D.N.Y. 1976).

In the case at bar, recognized by both the United States Attorney and defense counsel as being a case of the credibility of the defendant as opposed to the credibility of his patients (A. 79a, 31a, 36a), failure of the patients to testify before the grand jury deprived the defendant of an

opportunity to point out possible inconsistencies in that testimony, and submit such factors to the jury. Defendant was wholly deprived of his right to impeach by way of cross-examination and limited solely to testing the witnesses' memory of events which occurred five years before trial. Defendant was of necessity bound by the witnesses' answers in the recollection tests put to them, since he was allowed no means of discovering an independent outlet to either confirm or deny their testimony in response thereto. Both possible outlets, i.e., a grand jury appearance by the witness and the pre-trial furnishing of a witness list with addresses (see A. 39a-40a) were foreclosed in the proceedings below.

As Judge Weinstein noted in United States v. Arcuri, supra, 282 F. Supp. at 350, the refusal to bring government witnesses before the grand jury, compounded with the concurrent prosecution tactic of avoiding preliminary hearings (no longer necessary in this Circuit when the grand jury returns an indictment, Sciortino v. Zampano, 385 F.2d 132 (2d Cir. 1967), cert. denied, 390 U.S. 906 (1968)), has the net effect of cutting off the defendant from material that should be available to him as a partial substitute for pre-trial discovery proceedings.

Defendant is aware that this Court has failed to find prejudice based on the unavailability of impeaching material due to a witness' non-appearance before the grand jury. United States v. Liebowitz, 420 F.2d 39 (2d Cir. 1969). However, it is respectfully submitted that in so finding, this Court specifically recognized that the defense did have in its possession prior statements made by the witness which was thus readily available for impeachment purposes. Id. at 42 n. 2.

B. Patent Disregard Of The Constitutional And Historical Function Of The Grand Jury System

It is respectfully submitted that even if this Court does not find substantial prejudice by the government witnesses' failure to appear before the grand jury, reversal of the conviction is warranted because the defendant was deprived of his fifth amendment right to be indicted only through the means of a grand jury performing its constitutional function. Defendant is aware that the Supreme Court has long since held that the use of hearsay only before a grand jury may be sufficient to uphold the validity of an indictment. Costello v. United States, 350 U.S. 359 (1956). However, as Judge Weinstein has noted in United States v. Arcuri, supra, 282 F. Supp. at 349 :

> "There is no reason to believe that the Supreme Court in Costello intended to encourage the practice before the grand juries of deliberately relying solely on the testimony of witnesses without any personal knowledge when better evidence is readily at hand. Rather, Costello seems to have been designed to avoid technical failures of indictments because hearsay or other inadmissible evidence was used either inadvertently or because nothing more probative was immediately available." (emphasis added)

Indeed it was with the historic function of the grand jury in mind that this Court established, more than 10 years ago, the rule that:

> "Hearsay evidence should only be used when direct testimony is unavailable or when it is demonstrably inconvenient to summon witnesses able to testify to facts from personal knowledge."

United States v. Umans, 368 F.2d 725, 730 (2d Cir. 1966). The Umans decision, as has been noted by at least one other court, has considerably narrowed the breadth of the Costello opinion. United States v Gramolini, 301 F. Supp. 39, 42 (D.R.I. 1969). No such unavailability or inconvenience showing has been made by the prosecution herein as mandated by Umans. The defendant has thus been deprived of and the grand jury has failed to perform its prophylactic function of observing the demeanor of the government witnesses, (United States v. Filippatos, 307 F. Supp. 564, 565 (S.D.N.Y.

1969)) and making an independent evaluation of their credibility. (United States v. Gallo, 394 F. Supp. 310, 314 (D. Conn. 1975)). The effect of this particular grand jury function is to provide a separate opportunity for each jury (grand and petit) to judge for themselves the credibility of the defendant's accusers before a conviction may be obtained. The defendant in effect should be provided with two separate crossroads whereby a jury may reject the credibility of government witnesses and either refuse to indict or refuse to convict. The defendant herein was deprived of one of those. Since the testimony herein was purely hearsay in violation of the Umans rule, this Court should not hesitate to dismiss the indictment for this reason alone. United States v. Pastor, 419 F. Supp. 1318, 1324 (S.D.N.Y. 1976); see also United States v. Filippatos, supra, 307 F. Supp. at 567-68 (indictments based solely on hearsay when direct testimony was available will be quashed without a showing of prejudice if returned after December 9, 1968); United States v. Arcuri, supra, 282 F. Supp. at 351.

C. Prosecutorial Misconduct In Securing The Indictment.

Failure to Comply with Representations Made to this Court.

Following Judge Weinstein's ruling in United States v. Arcuri, supra, and in its opinion affirming that ruling (United States v. Arcuri, 405 F.2d 691 (2d Cir. 1968), cert.

denied, 395 U.S. 913 (1969)), this Court noted that the Government represented to it that the hearsay testimony practice, challenged in Arcuri, was no longer the policy of the United States Attorney in the Southern District of New York. United States v. Arcuri, supra, 405 F.2d at 693, n.4. However, where it was called to the attention of this Court that the United States Attorney was not abiding by this representation, a reversal of the conviction and dismissal of the indictment was warranted "to translate the assurances of the United States Attorneys into consistent performance by their assistants." United States v. Estepa, 471 F.2d 1132, 1137 (2d Cir. 1972). The Estepa Court specifically took note that the framers of the Constitution were not engaging in a "mere verbal exercise" when they directed that capital crimes be answered only on return of an indictment issued by a grand jury, and Costello v. United States, supra, notwithstanding, this Court was and is empowered, in the exercise of its supervisory powers, to prescribe standards relating to the use of hearsay before grand juries. Id. at 1136. See also United States v. Catino, 403 F.2d 491, 496-97 (2d Cir. 1968), cert. denied, 394 U.S. 1003 (1969) (reaffirming the Umans rule but noting that it would be an unduly harsh exercise of supervisory powers to impose sanctions on the government for failing to achieve full compliance where the indictment was returned less than a week after the

Umans decision. The Court did note however that there was non-hearsay testimony before the grand jury given by a central figure. Id. at 497.) No such excuse can be offered in the case at bar. It is respectfully submitted that in the exercise of this Court's supervisory powers, and in order to compel the United States Attorneys to abide by their representations made to this Court, and with a view toward preventing such abuses by them in the future, this Court must reverse the conviction and dismiss the indictment.

D. Plain Error And Waiver

Defendant is fully aware of Rules 12(b)(2) & (f) Fed. R. Crim. P. providing in pertinent part that objections to defects in the indictment must be raised prior to trial or such objection is waived. Previous counsel for the defense did not see fit to question the substantial prejudice to the defendant engendered at the grand jury.

It is respectfully submitted that the indictment herein is more than merely defective. It is the obtaining of the indictment that is prejudicial, which evidences prosecutorial disregard of the grand jury function, and shows a clear willingness to disregard previous representations made to this Court. To this extent, defendant does not come within the ambit of Rule 12.

To the extent that this Court finds that defendant is subject to Rule 12, it is respectfully submitted that

pursuant to Fed. R. Crim P. 12(f) the defendant has shown this Court good cause to grant relief from the waiver. Further, it is respectfully submitted that the hearsay testimony complained of constitutes plain error pursuant to Fed. R. Crim. P. 52(b) and may thus be noticed by this Court.

However, to the extent that this Court deems the failure to raise the grand jury issue prior to trial as a complete and absolute waiver, and refuses to find plain error thus denying defendant an opportunity to argue the merits of this issue on appeal, it is respectfully submitted that such finding merely further evidences the inadequacy of defense counsel below. For that discussion, this Court is respectfully referred to Point IV infra.

POINT IV

THE OVERWHELMING AMOUNT OF UNDUE PREJUDICE WHICH THE DEFENDANT WAS EXPOSED TO WITHOUT OBJECTION SHOWS THE INADEQUACY OF COUNSEL FOR THE DEFENSE BELOW AND DENIED DEFENDANT HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS.

Although this Court has not expressly overruled the standard of effective assistance of counsel as set down in United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), cert. denied, 338 U.S. 950 (1950)(lack of effective assistance must be such as to make proceedings a farce and mockery), it is respectfully submitted that this Court has been paying mere lip service to the Wight standard. In United States v. Taylor, slip op. 2805, 2829-30 (2d Cir. April 13, 1977) and previous to Taylor in Rickenbacker v. Warden, 550 F.2d 62, 65-66 (2d Cir. 1976), this Court, in declining to decide whether the Wight standard should be reconsidered and revised, examined counsel's performance not on the basis of Wight but rather on the less rigid standards established in other circuits. See also United States v. Joyce, 542 F.2d 158, 160 (2d Cir. 1976). Defendant will not repeat the well-reasoned dissenting opinion of Judge Oakes in Rickenbacher, supra, 550 F.2d at 67-68 but rather will show that defense counsel's performance below did not live up to the actual standard employed by this Circuit of "reasonable competency". The record discloses the following in this

regard:

1. The defendant was questioned with regard to his gross income in 1972. The prosecutor was allowed to prove that gross earnings of the defendant in 1972 from Medicaid were $27,457.20 (A. 281a). Further testimony from the defendant was to the effect that he recollected that from his private practice he earned between $3,000.00 and $4,000.00. The prosecutor offered the defendant's 1972 federal tax return, which showed $22,000.00 in gross receipts, without objection made by defense counsel (A. 282a). Despite the fact that there was no previous indication from the prosecution that such exhibit would be offered and thus constituted an obvious surprise to the defendant, no objection was made. Despite the fact that admission of a tax return showing an apparent understatement of gross income would have an obvious prejudicial effect on the jury, no attempt was made on the part of defense counsel to have the court weigh the prejudicial effect with the probative value of the exhibit (Fed. R. Evid. 403), or to question the admissibility of proof of income tax evasion, a crime not charged in the indictment. Fed. R. Evid. 404(b).

2. Despite the fact that the apparent understatement of gross income could be explained by reference to the defendant's method of factoring, an attempt by defense counsel

on redirect to rehabilitate the defendant helped more than it hurt the prosecution's cross-examination. The record in this regard speaks for itself (A. 283a-284a).

3. Defense counsel indicated to the court that because he did not have the second part of his daily copy and had not taken notes, he was not ready to sum up to the jury (A. 307a-308a). Defense counsel later admitted that he felt significantly handicapped in making summation, notwithstanding that the court noted that it would not have been difficult for him to take notes during a witness' testimony (A. 354a).

4. On summation, the prosecutor consistently stressed that the government contacted 45 people in connection with their investigation of the defendant, and 15 people testified, or one out of every three people that the investigator contacted. He further noted that the investigator did not have the time to contact any more "although Mr. Weisenfeld says that there were more patients than these. One out of three." (A. 314a). Despite the obvious conclusion which could be drawn by the jury that, of the 1,500-2,000 patients which represent the defendants' practice (A. 81a, 324a), one out of every three could testify against the defendant on a false claims count (see Point I(B) supra), defense counsel sat mute in the courtroom, making no objection to the prosecutor's remarks.

5. No objection was interposed to the prosecutor's remarks that from the evidence of ping ponging of patients, the jury could infer that those patients testifying had no intent to "go back for ten visits" (A. 316a) (see Point I(C) supra), despite the fact that such was evidence of other crimes and would not be admissible for the purpose of showing intent of the victims. Fed. R. Evid. 404(b).

6. No objection was interposed by defense counsel to the prosecutor's remarks that he found it "amazing" that the character witnesses' opinion of a person would not be changed if they knew that person "cheated" on $9,000.00 worth of gross income, and that he "thought" they just felt loyalty for Dr. Napoli notwithstanding that such remarks are in violation of previous dictates of this Court* and the Code of Professional Responsibility DR 7-106(C)(3) and (4) (A. 319a). See Point I(C) supra.

7. No objection was interposed by defense counsel to the prosecutor's remarks that even if the defendant did produce records and those records did support him, "there is nothing to say at that time he couldn't have made his records match to his invoices anyway" (A. 319a-320a), notwithstanding that such remark was totally speculative, unduly prejudicial, and had no support whatsoever in the record.

8. Despite repeated warnings from the Court,

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* United States v. Drummond, 481 F.2d 62 (2d Cir. 1973).

defense counsel persisted, on his summation, to instruct the jury as to the legal definition of reasonable doubt (A. 335a-337a), until the summation became less of an argument of counsel to the jury, and more of an argument between counsel and the court.

9. Defense counsel acknowledged the impact that the income tax evidence may have had on the jury (A. 343a), but rather than request a limiting instruction as to it (A. 351a-354a), defense counsel persisted in arguing to the jury that there was no indication of income tax cheating (A. 343a).

10. No objection by defense counsel was interposed to the prosecutor's remarks which had the effect of instructing the jury that the law allowed them to draw an inference "that a person who does not claim $9,000.00 on his tax return would be willing to cheat on Medicaid vouchers" (A. 350a) notwithstanding that this had the effect of depicting the defendant as a criminal-bent character, with a propensity for cheating the government in violation of Fed. R. Evid. 404(b).

Defendant fully acknowledges that this Court does not sit in judgment of the trial tactics and strategies of defense counsel. United States v. De Coster, 487 F.2d 1197, 1201 (D.C. Cir. 1973). However, when counsel's choices are

uninformed because of his lack of preparation, a defendant is denied his sixth and fourteenth amendment rights to effective assistance of counsel. Id. at 1201-02. It is respectfully submitted that th defendant herein does not have to show prejudice in order to sustain this claim (Moore v. United States, 432 F.2d 730, 737 (3d Cir. 1970)), although it is clear from the above, that the defendant has shown an overwhelming amount of prejudice. Further, should this Court find that the errors not objected to by defense counsel have been waived on appeal (Fed. R. Evid. 103(a)), and are not subject to the "plain error" exception (Fed. R. Crim. P. 52(b)), it is respectfully submitted that such factors are overwhelming indications of such prejudice and clear evidence that this defendant has been deprived of effective assistance of counsel.

Should this Court fail to find from the record as a matter of law that defendant was denied his constitutional right to effective assistance of counsel, it is respectfully submitted that this case be remanded to the district court for a hearing, cf. United States v. Yanishefsky, 500 F.2d 1327, 1334 (2d Cir. 1974) in order to give defendant an opportunity to show that inadequacy which may not be reflected in this record. United States v. De Coster, supra, 487 F.2d at 1204-05; Moore v. United States, supra, 432 F.2d 736-37.

POINT V

THE DISTRICT COURT IMPROPERLY DISCHARGED ITS DUTY TO IMPOSE AN APPROPRIATE SENTENCE.

Appellant is not unmindful of the body of federal precedents governing the limited scope of appellate review of sentences, especially, when the sentence imposed is within the requisite legislative limits. Gore v. United States, 357 U.S. 386 (1958); United States v. Tucker, 404 U.S. 443 (1972).*

Presented here, however, is an inquiry into the "judicial process" by which the particular punishment was determined. Such an inquiry by this Court is not an unjustified incursion into the province of the sentencing judge. On the contrary, it has always been a necessary incident of appellate review in criminal cases. Williams v. Oklahoma, 358 U.S. 576 (1959); Williams v. New York 337 U.S. 241 (1949); United States v. Hartford, 489 F.2d 651 (5th Cir. 1974).

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*There is authority, however, which demonstrates that the Supreme Court's support for this rule is only dicta. See, Blockburger United States 284 U.S. 299 (1932); Woosley v. United States 478 F.2d 139 (8th Cir. 1973); 2 C. Wright, Federal Practice and Procedure §533 at 451-52 (1969); United States v. Tucker, supra.

A careful examination of the sentencing minutes reveals an egregious departure by the trial judge from the lawful process to be employed during sentencing. More precisely, appellant contends that the sentence was imposed (1) without the informed and sound discretion of the trial judge after consideration of all the circumstances of the crime and (2) without consideration of the judicially approved policy of individualizing sentences.

During sentencing and after substantial discussion between the trial court and appellant's trial counsel, the trial judge made, inter alia, the following declarations:*

> "To let this go unpunished or without imposing a prison sentence is to license that kind of fraud. It is to announce to the whole medical profession that Medicaid is some kind of grab bag for greedy doctors. (A. 396a-397a) (emphasis added).

Judge McMahon continued:

> "It is time you were made to realize and your colleagues were made to realize that this is a serious crime.... (A. 397a) (emphasis added).

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*Judge McMahon's entire statement during the sentencing is reprinted at A. 388a-401a.

Whereupon Judge McMahon sentenced appellant to two years and a ten thousand dollar fine on the medicaid fraud counts and two years probation and a ten thousand dollar fine on the perjury count, those sentences to run consecutively (A. 397a-398a).

A fair reading of the sentencing minutes demonstrates that the trial court, flew off on a revealing tangent where the express purpose of the sentence was articulated in terms of an "announcement" to the entire medical profession and determined in order to have Dr. Napoli's punishment serve as an example to all his "colleagues." (A. 396a-397a) Such a fixed and misplaced view of sentencing is inconsistent with the discretion vested in the trial judge that he must fulfill his mandate to tailor the sentence imposed to the circumstances surrounding the individual offender. Williams v. New York; Woosley v. United States, supra; United States v. Baker, 487 F.2d 360 (2d Cir. 1973); United States v. Daniels, 446 F.2d 962 (6th Cir. 1971). The remarks made by the trial judge, especially those set forth above, however, reflect an apparent formulation to impose punishment based on a special class of offenders and on the particular category of crime committed foregoing any consideration of the individual record of defendant. This is especially true in light of the fact that the probation report demonstrated Doctor Napoli as a person dedicated to his practice, family and community (A. 391a),

a circumstance which the court failed to address in its determination of sentence (A. 396a-397a).

Defendant is unable to comprehend how the trial judge could have fairly considered all of the circumstances surrounding the commission of the crime when he failed to make any substantial comment specifically directed at defendant but instead chose to impose a sentence in the form of an announcement addressed to a special class. It is well established that treating offenders as members of a class is impermissible whether the class is defined by the offense committed or by membership in a group. See, United States v. Baker; Woosley v. United States , supra. Such a situation, as occurred here, is tantamount to a determination on sentencing because of guilt by association. There was absolutely no analyzation by the trial judge of possible mitigation. The sentencing formulation utilized here is under no reasonable conception an exercise of judicial discretion. The process employed, more precisely, was an abdication of judicial responsibility. In such instances this court has the power to review sentences. United States v. Brown, 470 F.2d 285 (2d Cir. 1972).

Generally, the assumption is that the trial judge, who has the best opportunity to observe the defendant and evaluate his character, will exercise his discretion in imposing sentence. Briscoe v. United States, 391 F.2d 984 (D.C. Cir. 1968); Woosley v. United States, supra. It is

appellant's understanding that on the aforesaid assumption the appellate courts have deferred to the trial court's judgment in their review of sentence. Yet, here, where it is apparent that no discretion was exercised at all and a sentence by class and category of crime was imposed, there would be no occasion for this appellate court usurping the discretion of the trial judge. Instead, by reviewing the instant sentence this Court would be merely according defendant the judicial discretion to which he is entitled, and was denied by the district court. United States v. Daniels, supra; Woosley v. United States, supra; United States v. Ingram, 530 F.2d 602 (4th Cir. 1975); United States v. Hartford, 489 F.2d 652 (5th Cir. 1974).

In Williams v. New York, supra at 248, n 13, the Supreme Court cited with approval certain basic considerations to be raised in determining an appropriate sentence: (i) the reformation of the offender, (ii) the protection of society, (iii) the disciplining of the wrongdoer and (iv) the deterrence of others from committing like offenses. Although the trial judge is free to utilize his discretion in sentencing he is not free to ignore these sentencing guidelines as established by the Supreme Court United States v. Daniels, supra; Woosley v. United States, supra. In the case at hand there is no evidence in the record that the district court evaluated the situation of this defendant in light of these basic

criteria. Likewise, the statements and omissions of the district court demonstrate a failure to examine the function and purpose of criminal punishment, namely, specific deterrence, incapacitation, rehabilitation, general deterrence, education and retribution. See, W. LaFave & A. Scott, Criminal Law §5 (1972). The trial judge's sentence, motivated by distorted purposes, (see p. 51 supra) displays a keen lack of consideration of the individual needs to deter, incapacitate and rehabilitate. These latter items require the sentence to be individualized rather than categorized.

Based on a reading of all the trial judge's remarks at sentencing, the only possible rationale, if any, for the extraordinary sentence* was his bias towards a particular class...his holding Dr. Napoli responsible, in some way, for the medicaid problem. Such a finding is entirely unsupported by any competent evidence of any kind and cannot and should not be permitted to influence the sentencing of a defendant convicted of a particular and, it must be noted, non-violent crime.

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*In United States v. Jacobson, 77 Cr. 168 ELP, (S.D.N.Y.), defendant Jacobson was convicted, after trial, of unlawfully and willfully engaging in a scheme to defraud the government whereby he would obtain money by submitting false medicaid claims (Title 18, United States Code, Section 287). The sentence imposed was thirty days incarceration and probation for eighteen (18) months and a fine of five hundred ($500.00) dollars. It should be noted that Jacobson was employed as a chiropractor at the same clinic as Dr. Napoli.

From all the foregoing, it is demonstrated that there was a real bias here directed against a class and category of offenders and in disregard of the individual defendant. It was of such a bias that its nature and intensity effectively prevented Dr. Napoli from obtaining a sentence uninfluenced by the Court's apparent pre-judgment concerning the crime committed. In light of all the above it cannot be expected that the original trial judge upon remand, will not find substantial difficulty in putting out of his mind his earlier impressions and improper views concerning the sentencing of this defendant. United States v. Robin, 553 F.2d 8 (2d Cir. 1977). Certainly, the pre-conceived views of the trial judge and his abdication of judicial discretion in regard to the circumstances of this crime make re-assignment advisable in order to preserve the appearance of fairness and justice. Id.

Clearly, the reasoning of the trial judge was so mistaken and misplaced that the sentence must be reviewed and invalidated and the case remanded for resentencing before a different judge.

POINT VI

THE VERDICT OF GUILTY ON ALL COUNTS IS NOT SUPPORTED BY THE WEIGHT OF THE CREDIBLE EVIDENCE.

The Court is respectfully referred to pages 10 through 14, supra.

CONCLUSION

BASED ON THE FOREGOING, IT IS RESPECTFULLY SUBMITTED THAT THE JUDGMENT OF CONVICTION BE REVERSED IN ALL RESPECTS AND THE INDICTMENT BE DISMISSED, OR ALTERNATIVELY THAT THE MATTER BE REMANDED FOR A NEW TRIAL.

Respectfully submitted,

DORAN, COLLERAN, O'HARA,
POLLIO & DUNNE, P.C.

By Robert A. Kennedy

Robert A. Kennedy
A Member of the Firm
1461 Franklin Avenue
Garden City, New York 11530
Tel. (516) 248-5757

Counsel for Appellant
Anthony Napoli

Of Counsel,

Robert A. Kennedy, Esq.
Robert J. Aurigema, Esq.
William M. Savino, Esq.
Stephen J. Smirti, Jr., Esq.

COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

ANTHONY NAPOLI,
Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 15th *day of* July, *19* 77 *at* One St. Andrews Plaza New York, N.Y. *upon*

deponent served the annexed Brief

U.S. Atty Southern Dist.
Robert Fiske Jr.

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

Sworn to before me, this 15th
day of July, *19* 77

Kevin E. Thomas

Print name beneath signature
KEVIN E. THOMAS

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979